U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 November 2006

CASE NOS.: 2005-BLA-6172 (LM)
2005-BLA-6173 (WM)

In the Matter of:

R.S. Substitute Party for
C.L.B. on behalf of and Survivor of
C.B.,
Claimant

v.

ARMCO, INC.,
Employer

And

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

James M. Haviland, Esq.,
For the Claimant

Christopher M. Hunter, Esq.,
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS[1]

This proceeding arises from a deceased miner's subsequent claim and his now deceased surviving spouse's claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*., as amended ("Act"), filed on January 21, 2001 and May 28, 2002, respectively.

[1] Sections 718.2 and 725.2(c) address the applicability of the 2001 regulations to claims. These regulations apply here.

The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal worker's pneumoconiosis" ("CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his first prior claim for benefits, on July 13, 1972. (Director's Exhibit ("DX") 1). The claim was denied. (DX 1). He filed his second claim, on December 19, 1980. (DX 1). While that claim was pending, he filed another claims form, on May 5,1980. (DX 1). On April 20, 1981, the claims were denied because the evidence failed to establish the miner was totally disabled due to pneumoconiosis. (DX 1).

The miner filed his present claim for benefits on January 31, 2001. (Director's Exhibit ("DX") 3). The claim was approved by the district director, on April 16, 2002, as the evidence established the elements of entitlement. (DX 31). Interim benefits were paid by the Black Lung Disability Trust Fund beginning January 2001 until the month of the miner's death, April 2002, with a lump sum payment for an earlier period. (DX 31). The miner died on April 19, 2002. On, April 22, 2002, and May 21, 2002, the employer requested a hearing of the miner's claim before an administrative law judge. (DX 33, 37).

The miner's now deceased surviving spouse filed her claim, on May 28, 2002 (DX 39). The claim was initially denied by the district director, on July 25, 2003, because the evidence failed to establish that the miner's death was due to pneumoconiosis. (DX 65). However, on August 12, 2003, the district director approved the claim. (DX 68). On September 16, 2003, the employer requested a hearing of the miner's claim before an administrative law judge. (DX 73). Interim benefits were paid by the Black Lung Disability Trust Fund beginning September 2003 until the month of the surviving spouse's death, January, 2005, in the amount of $ 801.90 per month with a lump sum payment of $ 13,415.40, for the period of April 1, 2002 through August 2003. The miner's, now deceased, surviving spouse died, on January 15, 2005. (DX 98). On January 26, 2005, an administrative law judge remanded the matter to the District Director in order to find a substitute party to pursue the claim. (DX 93, 100). The parties' daughter was thus added as the substitute party.

On July 6, 2005, the claims were referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program (OWCP) for a formal hearing. (DX). I was assigned the case on February 17, 2006.

On July 11, 2006, I held a hearing in Charleston, West Virginia, at which the claimant and employer were represented by counsel.[2] No appearance was entered for the Director, Office of Workman Compensation Programs (OWCP). The parties were afforded the full opportunity to present evidence and argument. In the miner's claim, Director's exhibits ("DX") 1-12 and 14-48 and 50-105, and Employer's exhibit ("EX") 1 were admitted into the record. Dr. Scott's reading of the 3/27/01 X-ray, in DX 22, was not admitted. DX 13, Dr. Zaldivar's CT report finding complicated CWP, DX 49, Dr. Dahhan's 4/10/03 report and CV, and DX 82, Dr. Repsher's reading of a 1/26/02 CT scan, were withdrawn in the miner's claim. Drs. Wheeler and Scott's readings of a 3/15/02 CT, in DX 82, were not admitted in the miner's claim. In the survivor's claim, Director's exhibits ("DX") 2-12 and 14-105, and Employer's exhibit ("EX") 1-2 were admitted into the record. Dr. Scott's reading of the 3/27/01 X-ray, in DX 22, was not admitted. Drs. Wheeler and Scott's readings of a 3/15/02 CT, in DX 82, were not admitted in the survivor's claim. Drs. Wheeler and Scott's readings of a 12/17/01 X-ray were not admitted in the survivor's claim. Briefs were submitted on or before 9/31/2006, as ordered.

ISSUES

I. Whether the miner had pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner was totally disabled?

IV. Whether the miner's disability death and/or death were due to pneumoconiosis?

V. Whether there has been a change in an applicable element of entitlement upon which the order denying the prior claim became final? (Post-Jan. 19, 2001).

[2] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(*en banc*), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction. Under *Kopp v. Director, OWCP*, 877 F.2D 307, 309 (4th Cir. 1989), the area the miner was exposed to coal dust, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

FINDINGS OF FACT

I. Background

A. Coal Miner[3]

The miner was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least thirty-two years. (DX 3, 4).

B. Date of Filing[4]

The now deceased miner filed his claim for benefits, under the Act, on January 31, 2001. (DX 3). The now deceased surviving spouse filed her claim, on May 28, 2002. (DX 39). The employer has not rebutted the presumption that the miner's claim was timely filed. There is no time limit on the filing of a claim by the survivor of a miner.
None of the Act's filing time limitations are applicable; thus, the claims were timely filed.[5]

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[3] Former subsection 718.301(a) provided that regular coal mine employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses and shall not be contingent upon a finding of a specific number of days of employment within a given period. 20 C.F.R. § 718.301 now provides that it must be computed as provided by § 725.101(a)(32). The claimant bears the burden of establishing the length of coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34 (1984). Any reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See Croucher v. Director, OWCP,* 20 B.L.R. 1-67, 1-72 (1996)(en banc); *Dawson v. Old Ben Coal Co*., 11 B.L.R. 1-58, 1-60 (1988); *Vickery v. Director, OWCP*, 8 B.L.R. 1-430, 1-432 (1986); *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910, 1-912 (1984).

[4] 20 C.F.R. § 725.308 (Black Lung Benefits Act as amended, 30 U.S.C.A. §§ 901-945, § 422(f)).

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner… There is no time limit on the filing of a claim by the survivor of a miner.
> (c) There shall be a rebuttable presumption that every claim for benefits is timely field…the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

[5] For duplicate claims see: *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004)(*en banc*). BRB declined to apply Sixth Circuit's ruling in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 B.L.R. 2-288 (6th Cir. 2001) to cases arising outside the Sixth Circuit. The statue of limitations (three years after receiving a medical determination of total disability due to CWP) at Section 422(f) of the Act, 30 U.S.C. Section 932(f), as implemented by 20 C.F.R. Section 725.308, applies only to the first claim filed not to a duplicate or subsequent claim. *Andryka v. Rochester & Pittsburgh Coal Co*., 14 B.L.R. 1-34 (1990) and *Faulk v. Peabody Coal Co*., 14 B.L.R. 1-18 (1990). See also *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. ___ , BRB No. 01-0728 BLA (Sept. 24, 2002)(*En Banc)*(arising in the 6th Circuit) Motion for Reconsideration filed October 24, 2002 (Relying on *Dukes, infra*). The Board remanded the case to determine whether it was time-barred, under *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk},* 264 F.3d 602, Case No. 00-3316 (6th Cir. 2001). *Peabody Coal Co. v. Director, OWCP [Dukes]*, 202 WL 31205502 (6th Cir. 2002)(Unpublished). The Court reaffirmed its holding in *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602, Case No. 00-3316 (6th Cir. 2001), but found that its comments in *Dukes* that prior medical opinions in favor of the claimant, but which were found premature because the weight of the evidence did not

C. Responsible Operator[6]

ARMCO, Inc., is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart F (Subpart G for claims filed on or after Jan. 19, 2001[7], Part 725 of the Regulations.[8]

D. Dependents & Survivorship

The miner had two dependents for purposes of augmentation of benefits under the Act, his wife and adopted daughter. (DX 3, 8, 9, 10, 31). The adopted daughter, born 10/12/81,

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support entitlement in an earlier claim were "effective to begin the statutory period" was dicta. Instead, it now adopts the 10th Circuit's holding in *Wyoming Fuel Co. v. Director, OWCP [Brandalino]*, 90 F.3d 1502, 20 B.L.R. 2-302 (10th Cir. 1996) and concluded, "… a mis-diagnosis does not equate to a 'medical determination' under the statute. That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes."

[6] Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator, or if the responsible operator is unknown or is unable to pay benefits, with the Black Lung Disability Trust Fund. 20 C.F.R. § 725.493(a)(1) defines responsible operator as the claimant's last coal mine employer with whom he had the most recent cumulative employment of not less than one year.

[7] § 725.495 criteria for determining a responsible operator. (Applicable to claims filed on or after Jan. 19, 2001).

"(a)(1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the "responsible operator") shall be the potentially liable operator, as determined in accordance with § 725.494, that most recently employed the miner…(b) It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with § 725.494(e)…

(d)…(when) the operator finally designated as responsible pursuant to § 725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation. If the reasons include the most recent employer's failure to meet the conditions of § 725.494(e), the record shall also contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of § 725.494(e)(1) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim."

[8] 20 C.F.R. § 725.492. The terms "operator" and "responsible operator" are defined in 20 C.F.R. §§ 725.491 and 725.492. The regulations provide two rebuttable presumptions to support a finding the employer is liable for benefits: (1) a presumption that the miner was regularly and continuously exposed to coal dust; and (2) a presumption that the miner's pneumoconiosis **(disability or death and not pneumoconiosis for claims filed on or after Jan. 19, 2001)** arose out of his employment with the operator. 20 C.F.R. §§ 725.492(c) and 725.493(a)(6) (§§ 725.491(d) and 725.494(a) for claims filed on or after Jan. 19, 2001). To rebut the first, the employer must establish that there were no significant periods of coal dust exposure. *Conley v. Roberts and Schaefer Coal Co.*, 7 B.L.R. 1-309 (1984); *Richard v. C & K Coal Co.*, 7 B.L.R. 1-372 (1984); *Zamski v. Consolidation Coal Co.*, 2 B.L.R. 1-1005 (1980). To rebut the second, the operator must prove "within reasonable medical certainty or at least probability by means of fact and/or expert opinion based thereon that the claimant's exposure to coal dust in his operation, at whatever level, did not result in, or contribute to, the disease." *Zamski v. Consolidation Coal Co.,* 2 B.L.R. 1-1005 (1980). Neither presumption has been rebutted in this case.

remained dependent (attending school) until 6/1/01, when she married. The parties agreed and I find the now deceased miner's spouse was an eligible survivor of a miner.[9]

E. Personal, Employment and Smoking History[10]

The decedent miner was born on July 29, 1915. (DX 3). He married C.L.B. (the now deceased surviving spouse claimant), on November 1, 1941. (DX 3, 8). The miner's last position in the coal mines was that of a roof bolter. (DX 4).

He was employed in one or more underground mines for about 32 years or more, until 1974. The claimant, as part of his duties, was required to perform hard labor. He stopped mining because of "shortness of breath" and his "doctor advised due to breathing problems". (DX 3).

The evidence is conflicting concerning the miner's smoking history. However, I find he smoked lightly for a long period of time, about 42 years, ending in about 1961. Between 1955 and 1960, he smoked about one pack every three days. (DX 14).

II. Medical Evidence[11]

A. Chest X-rays[12]

There were seventeen readings of ten X-rays, taken between November 1972 and January 22, 2002.[13] Eleven of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102(b).[14] Fourteen readings are positive, mostly by who are Board-certified in

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[9] § 725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving spouse or surviving divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a claim filed prior to June 30, 1982.

[10] "The BLBA, judicial precedent, and the program regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

[11] *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004)(*en banc*). BRB upheld regulatory limitations on the admissibility of medical evidence, under the new 2001 regulations, i.e., 20 C.F.R. Sections 725.414 and 725.456(b)(1).

[12] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e)(effective Jan. 19, 2001).

[13] *Mosley v. Eastern Associated Coal Corp*., BRB No. 05-0720 (April 27, 2006)(Unpublished). Where claimant could not show how the result would change, it was not error for the judge to consider the totality of the X-ray evidence without first determining whether each separate film was positive or negative. Here, the judge found much of the recent X-ray evidence in equipoise.

[14] ILO-UICC/Cincinnati classification of Pneumoconiosis – The most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the

radiology and/or B-readers.[15] Three readings are negative, by physicians all of whom are either B-readers, Board-certified in radiology, or both.[16] None of the X-ray readings from the prior miner's claim are considered in the survivor's claim, as noted above.

Exh. #	Dates: 1. X-ray 2. read	Reading Physician	Qualific-ations	Film Quality	ILO Classification	Interpretation Or Impression
DX 1	11/14/72 01/07/73	Jacobson	BCI(P); A		1/2, q, em	
DX 1	11/14/72 11/14/72	Harrison	BCR		1/1, q	
DX 1	01/29/74 1/29/74	OP Board			CWP	
DX 1	01/06/75 01/06/75	W. Ellswood	BCR		CWP	
DX 1	01/17/81 01/17/81	Deardorff	B; BCR	2	2/1-2/2, q, Cat. A, em	
DX 1	11/20/80 11/20/80	Chillag			CWP	
DX 1	01/17/81 04/04/81	Greene			1/0, q	
DX 20	03/27/01 03/27/01	Ranavaya	B	1	1/2, p/q, A	
DX 21	03/27/01 05/17/01	Binns	B; BCR	2	Quality only	
DX 22	03/27/01 12/11/01	Wheeler	B; BCR	2	Negative, em, tb	Irregular mass/fibrosis RUL
DX 50	05/24/01	D. Sparks			Advanced COPD c/i CWP, RUL prob PMF	Cannot exclude neoplasm.
DX	06/02/01	Sparks			CWP, COPD,	Strongly consider

International Labor Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs.

[15] *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308 (3rd Cir. 1995) at 310, n. 3. "A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993)."

[16] *Cranor v. Peabody Coal Co.,* 21 B.L.R.1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon*. 22 B.L.R. 1-1 (Oct. 29, 1999)(*En banc*). Judge did not err considering a physician's X-ray interpretation "as positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) without considering the doctor's comment." The doctor reported the category I pneumoconiosis found on X-ray was not CWP. The Board finds this comment "merely addresses the source of the diagnosed pneumoconiosis (& must be addressed under 20 C.F.R. § 718.203, causation)."

Exh. #	Dates: 1. X-ray 2. read	Reading Physician	Qualific-ations	Film Quality	ILO Classification	Interpretation Or Impression
52	06/02/01				PMF	neoplasm.
DX 82, EX3	06/02/01 09/18/02	Repsher	B	1	1/2, q/r, em	
DX 82, EX1	12/17/01 12/21/01	Wheeler	B; BCR	1	Negative, em	Prob healed tb or ca.
DX 82	12/17/01 12/20/01	Scott	B; BCR	1	Negative, em, ca	RUL mass prob healed tb or ca.
DX 82	12/17/01 09/18/02	Repsher	B	2	1/2, q/r, em	
DX 52	01/22/02 01/22/02	Maroney			CWP, COPD, consider ca	
DX 82	01/22/02 09/18/02	Repsher	B		1/2, q/r, em	

* A-A-reader; B-B-Reader; BCR – Board Certified Radiologist; BCP – Board-certified pulmonologist; BCI – Board-certified internal medicine; BCI(P) – Board-certified internal medicine with pulmonary medicine sub-specialty. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987), *Old Ben Coal Co. v. Battram,* 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993), and *Zeigler Co. v. Kelley*, 112 F.3d 839, 842-843 (7th Cir. 1997). B-readers need not be radiologists. *Cannelton Industries, Inc. v. Director, OWCP[Frye],* Case No. 03-1232 (4th Cir. April 5, 2004)(Proper to accord more weight to radiologists' readings over non-radiologists). *Bethenergy Mines, Inc., v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004)(Unpub.)(Appropriate to accord greater weight to the x-ray interpretation of a dually-qualified reader over a B-reader).

**The existence of pneumoconiosis may be established by chest X-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest X-ray classified as category "0," including subcategories "0/-, 0/0, 0/1," does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp*., 6 B.L.R. 1-307 (1983) (Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997)(*en banc)(Unpublished)*. If no categories are chosen, in box 2B(c) of the X-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

CT Scans

The record contains the results of four CT scans, from March 2002, read by five physicians (Drs. Maroney, Rosenberg, Skeens, Dameron, and Cordell) most of whose credentials are unknown. They show irregular mass/opacity (RUL), possible malignancy, severe emphysema, possible minimal simple CWP, no complicated CWP, possible pneumonitis, irregular opacities (RUL), mild scattered chronic fibrotic changes, granuloma (left base) and, pneumonia. A 1/26/02 CT read by Dr. Rosenberg revealed possible minimal simple CWP, severe emphysema, and no complicated CWP. This was read by Dr. Repsher as showing emphysema and mild simple CWP, limited to the RUL. (EX 3). Dr. Rosenberg testified that the CTs of 1/26/02 and 3/15/02, did not show the "micronodularity" associated with coal dust exposure.

Comparing the same lung areas depicted in the CTs with Dr. Ranavaya's X-ray reading, Dr. Rosenberg testified he could determine the miner did not have category "A" CWP. However, Dr. Rosenberg admitted (2003) that "the few scattered upper lobe micronodules observed on his CT scans, represent a minimal degree of simple CWP." (DX 82). Dr. Zaldivar, whose credentials are not of record, read a 11/15/96 CT to confirm PMF rather than cancer. (DX 13). Dr. Zaldivar's CT reading was not considered in the miner's claim, but considered in the survivor's claim.

A CAT scan falls into the "other means" category of 20 C.F.R. § 718.304(c) rather than being considered an X-ray under § 718.304(a). A "CT" or "CAT scan" is "computed tomography scan or computer aided tomography scan. Computed tomography involves the recording of 'slices' of the body with an x-ray scanner (CT scanner). These records are then integrated by computer to give a cross-sectional image. The technique produces an image of structures at a particular depth within the body, brining them into sharp focus while deliberately blurring structures at other depths. *See,* THE BANTAM MEDICAL DICTIONARY, 96, 437 (Rev. Ed. 1990)." *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991). In *Consolidation Coal C. v. Director, OWCP [Stein]*, ___ F.3d ___, 22 B.L.R. 2-409, 2002 WL 1363785 (7th Cir. June 25, 2002), the Court rejected the employer's argument that a negative CT is conclusive evidence the miner does not have pneumoconiosis. The DOL has also rejected such a view. Nor need a negative CT be given controlling weight because the statutory definition of "pneumoconiosis" encompasses a broader spectrum of diseases than those pathological conditions which can be detected by clinical test such as X-rays and CT scans. Dr. Rosenberg testified, at his deposition, that CTs are a "much more sensitive. . .accurate way of looking at the lungs. . . in comparison to a chest X-ray."

B. Pulmonary Function Studies[17]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed

[17] § 718.103(a)(Effective for tests conducted after Jan. 19, 2001 (See 718.101(b)), provides: "Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop)." 65 Fed. Reg. 80047 (Dec. 20, 2000). In the case of a deceased miner, where no pulmonary function test are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner. 20 C.F.R. § 718.103(c).

tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician Date Exh.#	**Age Height**	**FEV_1**	**MVV**	**FVC**	**Trac-ings**	**Compre-hension Cooper-ation**	**Qualify * Con-form****	**Dr.'s Impression**
CAMC 01/29/74 DX 1	58 69"	3.62	32.0	5.2	yes		No* Yes**	
Chillag 11/20/80 DX 1	65 70"	2.63	71.0	4.43	yes		No* Yes**	Submax MVV, otherwise normal. Dr. McQuillen finds invalid.
Fritzhand 01/17/81 DX 1	65 70"	3.10	76.0	4.20	yes	Good	No Yes**	
Ranavaya 03/27/01 DX 16	85 68"	1.45 1.50	25.0 26.0	2.83 2.73	yes	Fair Fair	No* Yes** Yes* Yes**	Dr. Gaziano validated.(DX 17, 18).
Crisalli 12/17/01 DX 15	86 67"	1.59 1.75	38.0	3.34 3.59	yes	Good Good	No* Yes** Yes* Yes**	

*A "**qualifying**" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

** A study "**conforms**" if it complies with applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). (*See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993)). A judge may infer in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP,* 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).

Appendix B (Effective Jan. 19, 2001) states "(2) the administration of pulmonary function tests shall conform to the following criteria: (i) Tests shall not be performed during or soon after an acute respiratory illness…"

Appendix B (Effective Jan. 19, 2001), (2)(ii)(G): Effort is deemed "unacceptable" when the subject "[H]as an excessive variability between the three acceptable curves. The variation between the two largest FEV_1'S of the three acceptable tracings should not exceed 5 percent of the largest FEV_1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve the degree of reproducibility, tests not meeting this criterion may

still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test." (Emphasis added).[18]

C. Arterial Blood Gas Studies[19]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date Ex. #	**Physician**	**PCO_2**	**PO_2**	**Qualify**	**Physician Impression**
11/20/80 DX 1	Chillag	38.5	70.0	No	
01/17/81 DX 1	Fritzhand	36.8 36.0	91.0 103.0	No No	
03/27/01 DX 19	Ranavaya	35.0	62.0	Yes	Rosenberg admits shows impairment. (EX 1).
12/17/01 DX 15	Crisalli	36.0	70.0	No	Rosenberg says this is "essentially normal" for an 85-year old. (EX 1).

*Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

Appendix C to Part 718 (Effective Jan. 19, 2001) states: "Tests shall not be performed during or soon after an acute respiratory or cardiac illness."

D. Physicians' Reports[20]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or

[18] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 42 F.3d 3 (4th cir. 1995). I find the miner was 69" here, his median reported height and his average reported height.

[19] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.

20 C.F.R. §718.204(b)(2) permits the use of such studies to establish "total disability." It provides: In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:…

(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…

pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Mohammad Ranavaya is a B-reader, but his other qualifications are not in the record. His report, based upon his examination of the miner, on March 27, 2001, notes 30-plus years of coal mine employment and a five-year smoking history of one pack every three days. (DX 14). No history of TB was noted.

Based on a qualifying arterial blood gas, a mixed results pulmonary function study, an EKG, and his positive chest X-ray reading, Dr. Ranavaya diagnosed both simple (p/q, ½) and complicated (type "A") pneumoconiosis. (DX 99). The complicated (type "A") pneumoconiosis diagnosis was solely attributed to the reading of the X-ray.

He opined that the claimant's pulmonary condition was related to his coal dust exposure. Dr. Ranavaya found the miner totally disabled. (DX 14). He indicated the miner's complicated pneumoconiosis was a major contributing factor in the impairment, (but offered no further reasoning).

Dr. Gaziano is a B-reader B-reader and is Board-certified in internal medicine with a subspecialty in pulmonary diseases. (DX 18). His report, based upon his examination of the miner, on February 27, 1975, notes 30 years of coal mine employment and a 20-pack-year smoking history, ending 14 years earlier. (DX 1).

Based on arterial blood gases, a pulmonary function study, an EKG compatible with old myocardial infarction or COPD, and a ("2/2") chest X-ray, Dr. Gaziano diagnosed pneumoconiosis and suggestion of early cor pulmonale.

Dr. Gaziano opined that the claimant's pulmonary condition was related to his coal dust exposure. He found the miner totally disabled, due to his age, and advised he not return to coal mine employment. (DX 1).

Dr. Shawn A. Chillag is Board-certified in internal medicine. His report, based upon his examination of the miner, on November 20, 1980, notes 32 years of coal mine employment and smoking up to ½ pack per day until 1976 history. Based on arterial blood gases, a pulmonary function study, and a positive chest X-ray, Dr. Chillag diagnosed simple pneumoconiosis and possible old TB per X-ray. He found the miner totally disabled due to his age (65). He did not believe CWP caused any pulmonary impairment of significance. (DX 1).

Dr. Chillag did not specify whether the claimant's pulmonary condition was related to his coal dust exposure.

Dr. Fritzhand's qualifications are not in the record. His report, based upon his examination of the miner, dated January 17, 1981, notes 32 years of coal mine employment and a ½ pack per day, six-year smoking history. (DX 1). Based on examination, arterial blood gases, a

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[20] *Dempsey v. Sewell Coal Co. & Director, OWCP* 23 B.L.R. 1-47, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (*en banc*). Under (new) 2001 regulations, expert opinions must be based on admissible evidence.

pulmonary function study, and a positive chest X-ray, Dr. Fritzhand diagnosed COPD related to coal dust exposure. (DX 1). He opined that the claimant's pulmonary condition was related to his coal dust exposure based on his work history. (DX 1).

Dr. Zaldivar is a B-reader and is Board-certified in internal medicine with subspecialties in pulmonary diseases, critical care, and sleep disorders. His report, based upon his examination of the miner and review of the medical records, on November 15, 1996, noted coal mine employment and a 43-year smoking history, ending 20 years earlier. (DX 13).

Based on CT scan, confirming complicated CWP, non-qualifying arterial blood gases, a pulmonary function study, and a positive chest X-ray, Dr. Zaldivar diagnosed complicated CWP. He failed to specify whether the claimant's pulmonary condition was related to his coal dust exposure.

Dr. Lawrence J. Repsher is a B-reader and is Board-certified in internal medicine with a subspecialties in pulmonary medicine and critical care medicine. His consultation report, based upon his review of the medical records of the miner, dated October 18, 2002, notes 30-32 years of coal mine employment, ending in 1974, and a 5/3 pack-year smoking history. (DX 48). He believed the smoking history was more extensive due to the extensive centrilobular emphysema seen on CT. Dr. Repsher observed that Dr. Gaziano had reported a 20-year smoking history.

Based on arterial blood gases, a pulmonary function study, and a positive chest X-rays, Dr. Repsher could not rule out very mild, simple, CWP (RUL) , insufficient to justify a "clear diagnosis" of CWP. (DX 48). He added that "given the overall pattern of the x-ray and CT abnormalities, it is "overwhelmingly" far more likely that (they) are due to healed pulmonary tuberculosis or some other granulomatous disorder and not due to coal workers pneumoconiosis." (DX 48).

Dr. Repsher opined that the claimant's mild-to-moderate, "pure", chronic obstructive pulmonary impairment ("COPD") was not "significantly" related to his coal dust exposure, but rather was characteristic of and "solely to his probable long and heavy cigarette smoking habit." (DX 48). He reasoned that CWP is "overwhelmingly" most likely to be a restrictive disease with some obstructive features. The miner, however, had "pure obstructive disease" there was "no element of restrictive disease." Dr. Repsher testified the miner's centrilobular emphysema which does not occur as a result of coal mine dust, but rather is characteristic of smoking. He found the miner had been "probably limited. . . with regard to performing his usual coal mining employment prior to his death." (DX 48). Dr. Repsher concluded that the miner's possible mild, simple CWP did not play any role in his disability or death nor did it cause, contribute or hasten his death. (DX 48). Death was caused by the miner's myelogenic leukemia "which almost always results in death." (DX 48). Dr. Repsher testified at a deposition, on October 29, 2004, where he reiterated his earlier opinions. (EX 2). He attached six medical articles which he represented were supportive of his testimony.

Dr. A. Dahhan is a B-reader and is Board-certified in internal medicine with a subspecialty in pulmonary medicine. His consultation report, based upon his review of enumerated medical records of the miner, dated April 10, 2003, notes 30 years of coal mine employment and a 1/3 pack per day, five-year smoking history. (DX 49).

Based on CTs, arterial blood gases, a pulmonary function study, and a positive chest X-ray, Dr. Dahhan diagnosed simple CWP, but no progressive massive fibrosis ("PMF") or complicated CWP. (DX 49). He observed the abnormality in the miner's right lung believed by Dr. Ranavaya to be due to lung cancer was never ruled out completely. All the available CTs did not confirm the presence of complicated CWP.

He gave no opinion whether the claimant's pulmonary condition was related to his coal dust exposure or smoke inhalation.. Dr. Dahhan concluded that the miner's simple CWP did not play any role in his disability or death nor did it cause, contribute or hasten his death. (DX 49). Death was caused by the miner's myelogenous leukemia. (DX 49).

Dr. Rosenberg is a B-reader and is Board-certified in internal medicine with subspecialties in pulmonary and occupational medicine. (DX 82). His 82-page extremely comprehensive, consultation report, based upon his review of the medical records of the miner over a thirty-year period and other evaluations, dated April 24, 2003 as supplemented May 10, 2004, notes 30 years of coal mine employment, ending in 1974 and a lengthy, but "mild", smoking history, ending in the 1970's.

Based on arterial blood gases, pulmonary function studies, and chest X-rays, Dr. Rosenberg diagnosed post-inflammatory scarring compatible with granulomatous infection and severe emphysema, but not complicated CWP. (DX 82). In the 2003 report, he found that a few of the scattered upper lobe micronodules, on CT scans, possibly represent a "minimal degree of simple coal workers' pneumoconiosis." (DX 82). However, in his May 2004 report, Dr. Rosenberg found no CWP confirmed by CT and no associated impairment. He found him totally disabled by his myelogenous leukemia ("CML"), which caused his death. (DX 82). The miner had no chronic lung disease or occupational lung disease which contributed to his death, but rather the CML lead to "life-terminating" pneumonia which caused respiratory compromise. The doctor wrote that the miner was not disabled from a respiratory perspective, but could not perform his previous coal mine work, from a pulmonary standpoint, due to CML. (DX 82).

Dr. Rosenberg testified at a deposition, on October 27, 2004, where he reiterated his earlier opinions. (EX 1). Dr. Rosenberg admitted that Dr. Ranavaya's PFS showed moderate impairment. (EX 1, p. 13). He relied, in great part, upon the later PFS by Dr. Crisalli, which he believed showed normalization post-bronchodilator, to conclude the miner "at worst" had "a mild degree of obstruction with a reversible component back to normal." (EX 1). Dr. Rosenberg testified that a CWP impairment is "fixed" and would not have improved with a later PFS. Dr. Rosenberg admitted that Dr. Ranavaya's non-qualifying AGS showed a degree of impairment. (EX 1, p. 13). He relied, in great part, upon the fact that he believed Dr. Crisalli's subsequent non-qualifying AGS showed "improvement" and was essentially normal for an 85-year old man. (EX 1). So, in 2004, he believed the miner's mild reversible obstruction would not have impaired him from his coal mine work. According to Dr. Rosenberg, one does not see improvement in PFS and AGS with CWP. Dr. Rosenberg testified that as a result of his CML, the miner developed "overwhelming" pneumonia during the last years of his life.

Dr. Crisalli examined the miner on 12/17/01 and conducted objective tests as noted. (DX 15). He is a B-reader and is Board-certified in internal medicine with subspecialties in pulmonary and occupational medicine. (DX 15). Dr. Crisalli noted the miner's 30-some years of

coal mine employment and no history of TB. He carefully described the nature of the miner's coal mine work. (DX 15).

III. Hospital Records & Physician Office Notes

The miner's treating physician, in the last two years of his life, Dr. Atkins, diagnosed the following over the years: COPD; emphysema; chronic myelogenous leukemia; hypertension; nocturia; anorexia; colitis; transient tachycardia; urinary retention; pneumonia; and, hypothyroidism. (DX 47; DX 82). In the January 22, 2002 admission records, he wrote the miner had "pneumoconiosis that is conglomerate." (DX 47, p. 3). In March 2002, the month before the miner's death, Dr. Atkins diagnosed a right lung mass and discharged the miner to hospice care`. (DX 47).

The hospital records submitted do not reflect the miner ever suffered from TB. Nor is TB mentioned in any medical histories taken by physicians. Drs. Skeens, Dameron, and Cordell read the portable X-rays, dated March 22, 2002, March 25, 2002, and March 27, 2002, without mentioning the presence of CWP. (DX 54, 55, 56).

IV. Death Certificate

The death certificate, signed by Dr. Atkins, lists the date of death as April 19, 2002. (DX 46). The cause of death was "chronic myelogenous leukemia " and other significant conditions contributing to death but not resulting in the underlying cause "chronic lung disease." (DX 46). No autopsy was performed.

V. Witness' Testimony

The miner's daughter, R.S., testified that she lived at home for the first eighteen years of her life, until her marriage, in 1963, and then lived close to the miner. She saw her father regularly. She was not aware he had any contagious diseases or TB. She said the miner had leukemia. She had never seen her father smoke. She could not explain the miner's apparent statement to a DOL doctor that he had smoked ½ pack per day from 1971-1976. She testified that Dr. Atkins was the only family doctor the miner ever had.

VI. Other

On January 29, 1974, the West Virginia Occupational Pneumoconiosis Board found the miner had a 20% impairment due to coal workers' pneumoconiosis. (DX 1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

1. Miner's Claims

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of

the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997. The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3rd Cr. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *See Eastover Mining Co. v. Director, OWCP [Williams]*,338 F.3d 501, No. 01-4064 (6th Cir. July 31, 2003), *citing Greenwhich Collieries [Ondecko]*, 512 U.S. 267 at 281; *see also Peabody Coal Co. v. Odom*, ___ F.3d ___, 2003 WL 21998333 (6th Cir. Aug. 25, 2003).

Since this was not the miner's first claim for benefits, and it was filed on or after January 19, 2001, it must be adjudicated under the new regulations.[21] Although the new regulations dispense with the "material change in conditions" language of the older regulations, the criteria remain similar to the "one-element" standard set forth by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994)[22], which was adopted by the United States Court of Appeals for the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997).] In *Dempsey*

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[21] Section 725.309(d)(For duplicate claims filed on or after Jan. 19, 2001)(65 Fed. Reg. 80057 & 80067):

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subpart E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see Sections 725.202(d)(miner), 725.212(spouse), 725.218(child), and 725.222(parent, brother or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

[22] Reiterated in *Grundy Mining Co. v. Director, OWCP[Flynn*], 353 F.3d 467 (6th Cir. 2003).

v. Sewell Coal Co. & Director, OWCP, 23 B.L.R. 1-47, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004)(*en banc*), the Board held that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement. . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. Section 725.309(d); *White v. New White Coal Co., Inc*., 23 B.L.R. 1-1, 1-3 (2004). According to the Board, the "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. Section 725.309(d)(2).

To assess whether a material change in conditions is established, the Administrative Law Judge ("Administrative Law Judge") must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously adjudicated against him in the prior denial, i.e., disability due to the disease.[23] *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 B.L.R. 2-76 (3rd Cir. 1995).[24] *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Unlike the Sixth Circuit in *Sharondale,* the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines*, 86 F.3d at 1363 n. 11. The Administrative Law Judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994)[25] and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995).

In *Caudill v. Arch of Kentucky, Inc.*, 22 B.R.B. 1-97, BRB No. 98-1502 (Sept. 29, 2000)(*en banc on recon.*), the Benefits Review Board held the "material change" standard of section 725.309 "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has

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[23] *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122, BRB No. 98-0714 BLA (Feb. 19, 1999). Lay testimony, standing alone, regarding the miner's worsened condition, since the denial of his last claim, is insufficient to establish a material change of condition, under 20 C.F.R. § 725.309, absent corroborating medical evidence.

[24] *Allen v. Mead Corp*. , 22 B.L.R. 1-61 (2000). In Circuits which have not addressed the standard applicable to duplicate claims, under 20 C.F.R. 725.309, the Board overruled its position, in *Shupink v. LTV Steel Co*., 17 B.L.R. 1-24 (1992), and adopted the position articulated in *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(*en banc*). That is, to establish a material change in conditions, a claimant must establish, with evidence developed subsequent to the denial of the earlier claim, at least one of the elements of entitlement previously adjudicated against him or her. In *Midland Coal v. Director, OWCP*, 358 F.3d 486, 23 B.L.R. 2-22 (7th Cir. 2004), the Court observed the new (2001) regulation, section 725.309 explicitly codified the holding in *Peabody Coal Co., et al, v. Director, OWCP [Spese]*, 21 B.L.R. 2-113, 1997 WL 353602, 117 F.3d 1001 (7th Cir. June 27, 1997).

[25] *See Abshire v. D & L Coal Co*., 22 B.L.R. 1-203 (Sept. 30, 2002) in the Sixth Circuit following *Stewart v. Wampler Brothers Coal,* 22 B.L.R. 1-80, BRB No. 99-0246 BLA (July 31, 2000)(*en banc)* and *Flynn v. Grundy Mining Co. & Director, OWCP*, 21 B.L.R. 1-40, 1-43 (1997)(ALJ must look at new evidence for "qualitative difference" from the old evidence), 23 B.L.R. 2-44, 353 F.3d 467 (6th Cir. 2003)(ALJ must determine: (i) based on all the evidence accompanying the subsequent claim, miner has proven at least one of the elements previously adjudicated against him; (ii) the new evidence is sufficiently more supportive to warrant a change in the outcome; and, (iii) based on the entire record, the miner is entitled to benefits).

occurred." Unless an element has previously been adjudicated against a claimant, "new evidence cannot establish that a miner's condition has changed with respect to that element." Thus, in a claim where the previous denial only adjudicated the matter of the existence of the disease, the issue of total disability "may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions…"

The claimant's first application for benefits was denied because the evidence failed to show that the claimant was totally disabled by pneumoconiosis. Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits.[26] In this case, the miner has now established total disability, as discussed more fully below.

2. Survivor's Claim

Part 718 applies to survivors' claims which are filed on or after April 1, 1980. 20 C.F.R. § 718.1. There are four possible methods of analyzing evidence in a survivor's claim under Part 718: (1) where the survivor's claim is filed prior to January 1, 1982 and the miner is entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; (2) the survivor's claim is filed prior to January 1, 1982 and there is no living miner's claim or the miner is not found entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; (3) the survivor's claim is filed after January 1, 1982 and the miner was found entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; and (4) the survivor's claim is filed on or after January 1, 1982 where there is no living miner's claim filed prior to January 1, 1982 or the miner is found not entitled to benefits as a result of a living miner's claim filed prior to January 1, 1982. The fourth, Subsection 718.205(c) applies to this claim. [27]

The Part 718 regulations provide that a survivor is entitled to benefits only where the miner *died due to pneumoconiosis.* 20 C.F.R. § 718.205(a). As a result, the survivor of a miner who was totally disabled due to pneumoconiosis at the time of death, but died due to an unrelated

[26] *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122, BRB No. 98-0714 BLA (Feb. 19, 1999). Lay testimony, standing alone, regarding the miner's worsened condition, since the denial of his last claim, is insufficient to establish a material change of condition under 20 C.F.R. § 725.309, absent corroborating medical evidence.

[27] The survivor is not entitled to the use of lay evidence, or the presumptions at §§ 718.303 and 718.305 to aid in establishing entitlement to survivors' benefits. Third Circuit, *Contra*, *Soubik v. Director, OWCP*, ___ F.3d ___, Case No. 03-1668 (3rd Cir. April 30, 2004). In *Soubik* , the Court held that its holding, in *Hillibush v. Dept. of Labor*, 853 F.2d 197, 205 (3rd Cir. 1988), provides a survivor may prove her claim using "medical evidence alone, non-medical evidence alone, or the combination of medical and non-medical evidence. . . " Thus, the ALJ was required to consider lay evidence in determining whether the miner had a pulmonary or respiratory impairment, but "[e]xpert testimony will usually be required to establish the necessary relationship between . . . observed indicia of pneumoconiosis and any underlying pathology. ' It thus was error for the ALJ to accord less weight to a medical opinion because it was based, in part, on lay evidence. In *Mancia v. Director, OWCP*, 130 F.3d 579, 21 B.L.R. 2-215(3d Cir. 1998)(survivor's claim), the Court held that a judge may not ignore uncontradicted lay testimony where it corroborates the medical testimony of a treating physician and is consistent with the medical records.

A survivor is automatically entitled to benefits only where the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982. However, a survivor is not automatically entitled to such benefits under a claim filed on or after January 1, 1982 where the miner is not entitled to benefits as a result of the miner's claim filed prior to January 1, 1982 or where no miner's claim was filed prior to January 1, 1982. *Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988).

cause, is not entitled to benefits. 20 C.F.R. § 718.205(c). Under § 718.205(c)(4)(2001), if the principal cause of death is a traumatic injury or a medical condition unrelated to pneumoconiosis, the survivor is not entitled to benefits unless the evidence establishes that pneumoconiosis was a substantially contributing cause of the death.

The regulations now provide and the Board has held that in a Part 718 survivor's claim, the Judge must make a threshold determination as to the existence of pneumoconiosis arising out of coal mine employment, under 20 C.F.R. § 718.202(a), prior to considering whether the miner's death was due to the disease under § 718.205. 20 C.F.R. § 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993). Then, it must be established the pneumoconiosis arose out of coal mine employment and that the miner's death was due to pneumoconiosis. *See, Haduck vc. Director, OWCP*, 14 B.L.R. 1-29 (1990) and *Boyd v. Director, OWCP*, 11 B.L.R. 1-39 (1988).

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[28] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilisosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.[29]

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[28] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1362; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 314-315. In *Henley v. Cowan and Co*., 21 B.L.R. 1-148 (May 11, 1999), the Board holds that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act. In *Workman v. Eastern Associated Coal Corp.,* 23 B.L.R. 1-22, BRB No. 02-0727 BLA (Aug. 19, 2004)(order on recon)(*En banc*) the Board ruled that because the potential for progressivity and latency is inherent in every case, a miner who proves the presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it was previously not, has demonstrated that the disease from which he suffers is of a progressive nature. In amending section 718.201, DOL concluded chronic dust diseases of the lung and its sequelae arising out of coal mine employment "may be latent and progressive, albeit in a minority of cases." *See* 64 Fed. Reg. 54978-79 (Oct. 8, 1999); 65 Fed. Reg. 79937-44, 79968-72 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003). "Although every case of pneumoconiosis does not possess these characteristics, the regulation was designed to prevent operators from asserting that pneumoconiosis is never latent and progressive. 20 C.F.R. Section 718.201(c); *see National Mining Association, et al, v. Chao, Sec. of Labor,* 160 F. Supp. 2d 47 (D.D.C. Aug. 9, 2001) *aff'd*, 292 F.3d 849 (D.C. Cir. 2002)(*"NMA")*, 292 F.3d at 863."
Midland Coal Co. v. Director, OWCP[Shores], 358 F.3d 486 (7th Cir. 2004). Seventh Circuit upheld DOL's 2001 definition of CWP as a latent and progressive disease. DOL's regulation, on this scientific finding is entitled to deference. It is designed to prevent operators from claiming CWP is never latent and progressive.

[29] Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers'

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[30] Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition. (See fn 42, *supra*).

"…[T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) *citing, Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995) and *see* § 718.201(a)(2)(2001).

In *Parsons v. Wolf Creek Collieries,* 23 B.L.R. 1-32, BRB No. 02-0188 BLA (Sept. 30, 2004*)(En banc*), the Board wrote, "[A]s we explained in *Workman v. Eastern Associated Coal Corp*., 23 B.L.R. 1-23, BRB No. 02-0727 BLA (Aug. 19, 2004)(order on recon)(*En banc*), because the potential for progressivity and latency is inherent in every case, a miner who proves the presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it was previously not, has demonstrated that the disease from which he suffers is of a progressive nature." The Board disagreed with the employer's argument that because the miner (without CWP upon cessation of coal mine employment) must prove he suffers from one of the rare forms

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pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
(Emphasis added).

[30] The definition of pneumoconiosis, in 20 C.F.R. section 718.201, does not contain a requirement that "coal dust specific diseases …attain the status of an "impairment" to be so classified. The definition is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether or not the particular disease exists to such an extent as to become compensable is a separate question." Moreover, the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure. *See, e.g., Warth*, 60 F.3d at 175." *Clinchfield Coal v. Fuller*, 180 F.3d 622 (4th Cir. June 25, 1999) at 625.

of CWP that could and did progress.[31]

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by:[32] (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion.[33] 20 C.F.R. § 718.202(a)(4). Here, the employer admits for the miner's claim, "[A]t best, the evidence is sufficient to establish the presence of simple pneumoconiosis" referring to the findings of its experts, Drs. Rosenberg and Repsher. (Brief, at 21). With respect to the survivor's claim, the employer admits, "a preponderance of the evidence is positive for simple coal workers' pneumoconiosis." (Brief, p. 29).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis. This is contrary to the Board's view that an administrative law judge may weigh the evidence under each subsection separately, i.e. X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). In so holding, the court cited to the Third Circuit's decision in *Penn Allegheny Coal co. v. Williams,* 114 F.3d 22, 24-25 (3d Cir. 1997) which requires the same analysis.

The claimants cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim field after January 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest X-ray evidence. 20 C.F.R. § 718.202(a)(1). The correlation between "physiologic and radiographic abnormalities is poor" in cases involving CWP. "[W]here two or more X-ray reports are in conflict, in evaluating such X-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." *Id.; Dixon v. North Camp Coal Co*., 8 B.L.R. 1-344 (1985)." (Emphasis added). (Fact one is Board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16

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[31] *Coutts v. Lion Mining Co*., BRB No. 04-0919 BLA (July 28, 2005)(Arising in 3d Circuit). Citing *Consolidation Coal Co. v. Director, OWCP [Kramer]*, 305 F.3d 203, Case No. 01-4398 (3d Cir. Sept. 24, 2002), the Board affirmed award to miner's widow. Proper for judge to discredit Dr. Oesterling's opinion premised on fact miner's lifetime AGSs and X-rays were non-qualifying or negative because it was predicated on faulty tenet that CWP could not have progressed.

[33] In accordance with the Board's guidance, I find each medical opinion documented and reasoned, unless otherwise noted. *Collins v. J & L Steel,* 21 B.L.R. 1-182 (1999) *citing Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); and, *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997). This is the case, because except as otherwise noted, they are "documented" (medical), i.e., the reports set forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis and "reasoned" since the documentation supports the doctor's assessment of the miner's health.

B.L.R. 1-31 (1991) at 1-37. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n.5 (1985).

A judge is not required to defer to the numerical superiority of X-ray evidence, although it is within his or her discretion to do so. *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990). This is particularly so where the majority of negative readings are by the most qualified physicians. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344(1985); *Melnick v. Consolidation Coal Co. & Director, OWCP,* 16 B.L.R. 1-31, 1-37 (1991). The X-ray evidence overwhelmingly establishes the miner suffered from CWP. Out of 14 readings between 1972 and 2002, only three readings by two employer physicians of two X-rays were negative. Those three negative readings, by Board-certified radiologists Wheeler and Scott, finding tuberculosis are wholly out of character with all the other readings and the progressive nature of CWP. Moreover, the miner's medical evidence shows very little, if any, evidence he ever had tuberculosis. I thus give them little weight.[34] The same holds for the survivor's claim; seven readings of five X-rays were positive with only the three negative readings of two of the five by Drs. Wheeler and Scott. While, in the survivor's claim, Drs. Wheeler and Scott were the most qualified readers, I find their readings outweighed by those of Drs. Ranavaya, Sparks, and, employer-expert Repsher, particularly considering the nearly unanimous physician opinions finding CWP. The focus of inquiry though is whether the miner had complicated pneumoconiosis or PMF.

Despite some initial equivocation, I find that the interpretations of the CT scans by Drs. Repsher and Rosenberg, employer experts, establishes simple CWP, in both claims. While Drs. Ranavaya and Sparks found PMF by X-ray, they did not have the benefit of the CT scans conducted in 2002. Both Drs. Rosenberg and Repsher had the CT results. Dr. Rosenberg carefully compared the CT results to Dr. Ranavaya's X-ray and determined while there was evidence of irregular opacities and mild fibrosis, as well as simple CWP, what Dr. Ranavaya observed was not PMF. The mass in the miner's right upper lung ("RUL") was suspected to be cancerous, as well as PMF. However, none of the CT readers ever identified PMF.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray.[35] 20 C.F.R. § 718.202(a).

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[34] *Yogi Mining Co. v. Director, OWCP [Fife]*, Case No. 04-2140 (4th Cir. Dec. 7, 2005)(Unpub.).
ALJ properly accorded less weight to CT scan interpretations of Drs. Scott and Wheeler, both dual-qualified radiologists, showing evidence of Tuberculosis (TB), whereas the miner's treating physician had reported negative TB test results.

[35] *Soubik v. Director, OWCP*, 366 F.3d 226, Case No. 03-1668, 23 B.L.R. 2-85 (3rd Cir. April 30, 2004). Physician's failure to diagnose the presence of pneumoconiosis would have an adverse effect on his or her ability to assess whether a miner's death was due to the disease. (Here, Dr. Spagnolo wrote that even if the miner had CWP, it would not have hastened his death despite both parties having agreed to the existence of the disease). Cites *Scott v. Mason Coal Co.,* 289 F.3d 263, 22 B.L.R. 2-374 (4th Cir. May 2, 2002) for proposition ALJ may not credit a

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical pinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician's report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.[36] *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). Because of their various Board-certifications, B-reader status, and expertise, as noted above, I rank Drs. Gaziano, Chillag, Repsher, Dahhan, Rosenberg, and Crisalli above Drs. Atkins, Ranavaya, Fritzhand, whose qualifications are not of record.

While the courts and the Board earlier recognized that there may be a practical distinction between a physician who merely examines a miner and one who is one of his "treating" physicians, that preference has largely been obviated, except in the Third Circuit.[37] In *Black and*

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diagnosis of no CWP causing respiratory disability after ALJ has found CWP, unless "specific and persuasive reasons" are given.

[36] *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health. *Fuller v. Gibraltor Coal Corp.*, 6 B.L.R. 1-1291 (1984)…" In *Cornett v. Benham Coal, Inc.,* 227 F.3d 569, Case No. 99-3469, 22 B.L.R. 2-107 (6th Cir. Sept. 7, 2000), the court held if a physician bases a finding of CWP only upon the miner's history of coal dust exposure and a positive X-ray, then the opinion should not count as a reasoned medical opinion, under 20 C.F.R. § 718.202(a)(4).

[37] "Treatment" means "the management and care of a patient for the purpose of combating disease or disorder." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, p. 1736 (28th Ed. 1994). "Examination" means "inspection, palpitation, auscultation, percussion, or other means of investigation, especially for diagnosing disease, qualified according to the methods employed, as physical examination, radiological examination, diagnostic imaging examination, or cystoscopic examination." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, p. 589 (28th Ed. 1994). *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989); *Jones v. Badger Coal Co.*, 21 B.L.A. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*)(Proper for Judge to accord greater weight to treating physician over non-examining doctors). In *Soubik v. Director, OWCP*, 366 F.3d 226, Case No. 03-1668, 23 B.L.R. 2-85 (3rd Cir. April 30, 2004), citing *Mancia v. Director OWCP*, 130 F.3d 579, 590-591 (3rd Cir. 1997), the Court reiterated that "It is well-established in this Circuit that treating physician's opinions are assumed to be more valuable than those of non-treating physicians. *Lango v. Director, OWCP*, 104 F.3d 573 (3rd Cir. 1997). The Court wrote that while there is "some question about the extent of reliance to be given a treating physician's opinion when there is conflicting evidence, *compare Brown v. Rock Creek Mining Co*., 996 F.2d 812, 816 (6th Cir. 1993)(opinions of treating physicians are clearly entitled to greater weight than those of non-treating physicians), "a judge may require "the treating physician to provide more than a conclusory statement (before finding pneumoconiosis contributed to the miner's death)." *But see, Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997), wherein the Court held that a rule of absolute deference to treating and examining physicians is contrary to its precedents. *See also, Amax Coal Co. v. Franklin,* 957 F.2d 355 (7th Cir. 1992) where the court criticized the administrative law judge's crediting of a treating general practitioner, with no apparent knowledge of CWP and no showing that his ability to observe the claimant over an extended time period was essential to understanding the disease, over an examining Board-certified pulmonary specialist bordered on the irrational. The Court called judge's deference to the "treating physician" over a non-treating specialist unwarranted in light of decisions such as

Decker Disability Plan v. Nord, Case No. 02-469, ___ U.S. ___, ___ S.Ct. ___ (May 27, 2003), the Court held ERISA plan administrators (Courts) need not give special deference to the opinion of a treating physician. Dr. Atkins was the miner's treating physician for the two years leading up to his death. As such, his opinion must be considered under the criteria of section 718.104(d).[38] He regularly treated the miner for chronic lung disease, including emphysema and COPD, and CML, but mostly for CML. His records refer to the RUL mass and conglomerate CWP, but do not specify the etiology of the same. It is not shown that Dr. Atkins had any special qualifications, nor did the claimants choose to submit his credentials or a statement suggested by section 718.104(d). Thus, I cannot give his opinions controlling or greater weight.

As a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease. *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983); and, *Call v. Director, OWCP*, 2 B.L.R. 1-146 (1979).[39] This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *Garrison v. Heckler*, 765 F.3d 710, 713-15 (7th Cir. 1985); and, *DeFrancesco v. Bowen*, 867 F.2d 1040, 1043 (1989).
Consolidation Coal Co. v. Director, OWCP [Held], ___ F.3d ___, Case No. 99-2507 (4th Cir. Dec. 20, 2000)(with Dissent). Improper to accord greater weight to the opinion of treating physician because he had treated and examined claimant each year over the past ten years. In *Grizzle v. Pickland Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993), we clearly stated we had not fashioned any presumption or requirement that the treating physicians' opinions be given greater weight. While the treating physician's opinion here may have been entitled to "special consideration", it was not entitled to the greater weight accorded. In *Eastover Mining Co. v. Director, OWCP [Williams]*, 338 F.3d 501, No. 01-4064 (6th Cir. July 31, 2003), the Court made clear its view that no deference is given to treating physicians merely because of their status as the same. It pointed out, citing *Black & Decker Disability Plan v. Nord*, 123 S.Ct. at 1969, 1971, the Supreme Court itself has "disapproved of the 'treating physician rule' with language that criticizes the principle itself, rather than its operation in an ERISA context."

[38] § 718.104(d) Treating Physician (Jan. 19, 2001). In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication office shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officers' decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

[39] *Cranor v. Peabody Coal Co.*, 21 B.L.R. 1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon*. 22 B.L.R. 1-1 (Oct. 29, 1999)(*En Banc.*). In a case arising in the Sixth Circuit, the Board held it was proper for the judge to give greater weight to more recent evidence, as the Circuit has found CWP to be a "progressive and degenerative disease." *See also Abshire v. D & L Coal Co*. 22 B.L.R. 1-203 (2002), citing *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d

In *Adkins v. Director, OWCP*, 958 F.2d 49, 16 B.L.R. 2-61 (4th Cir. 1992), the Court held that it is rational to credit more recent evidence, solely on the basis of recency, only if it shows the miner's condition has progressed or worsened. The court reasoned that, because it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved, inasmuch as pneumoconiosis is a progressive disease and claimants cannot get better, "[e]ither the earlier or later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier…" *See also, Thorn v. Itmann Coal Co.,* 3 F.3d 713, 18 B.L.R. 2-16 (4th Cir. 1993). In this case, consistent with the progressive nature of CWP, the more recent evidence conclusively establishes the existence of CWP.

In the miner's claim, at least six physicians diagnosed CWP, one of which was a legal CWP determination. Similarly, in the survivor's claim, all the doctors opinions concluded the miner suffered from CWP. While there was some initial equivocation by Drs. Repsher and Rosenberg, I find they too found CWP. While it is clear the miner suffered from COPD, including emphysema, only Dr. Fritzhand, in 1981, found it due to coal mine dust exposure. His credentials are not of record. Moreover, a number of doctors, i.e., Drs. Repsher and Rosenberg, who subsequently reviewed more medical data over time, found the COPD due to the miner's smoking. I credit those later opinions over Dr. Fritzhand's opinion.

Dr. Repsher's opinions that coal workers' pneumoconiosis usually causes a restrictive pulmonary pattern is of concern. In *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951 (4th Cir. 1997), the Court stated that "[A]n ALJ must not rely upon the opinion of an expert who expresses an opinion based on a premise 'antithetical to the Black Lung Benefits Act' because such an opinion 'is not probative.'" *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993). The Court listed opinions addressing "hostility to the Act." As the Court said in *Freeman-United Coal Mining Co. v. Office of Workers' Compensation*:

> Physicians retained by coal companies add that [coal workers' pneumoconiosis] is a restrictive lung disease, that is, it impedes breathing in, rather than an obstructive one, such as emphysema, that makes it difficult to breath out…Not all physicians agree, however, that coal workers' pneumoconiosis is always restrictive rather than obstructive or even that it always produces X-ray abnormalities. Whoever is right, the black lung statute has been interpreted to define coal workers' pneumoconiosis in accordance with the second, the broader, view, as any chronic lung diseases caused in whole or in part by exposure to coal dust. So, if in an attempted rebuttal of the statutory presumption of pneumoconiosis the coal company tendered a doctor's report which merely stated that the miner has no signs of clinical pneumoconiosis (as that doctor understood the term), without commenting on the possibility that he might have another chronic lung disease caused or exacerbated by inhaling coal dust, the rebuttal would indeed fail.

55, 19 B.L.R. 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP,* 991 F.2d 314, 17 B.L.R. 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990); and, *Clark v. Karst-Robbin Coal Co*., 12 B.L.R. 10-149 (1989), the Board holds greater weight may be accorded to more recent X-ray evidence of record. In *Abshire*, the Board also recognized *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 B.L.R. 2-1 (1987) (CWP is a progressive disease).

Freeman-United Coal Mining Co. v. Office of Workers' Compensation Programs, 957 F.2d 302 (7th Cir. 1992) at 303.

In *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 B.L.R. 2-246 (4th Cir. 1996), the court held that a physician's opinion should not be discredited if he merely states that a miner "likely" would have exhibited a restrictive impairment in addition to chronic obstructive pulmonary disease.[40] Dr. Repsher's opinion is more aligned with the physician's opinion in *Stiltner* and thus may not be summarily dismissed as antithetical to the Act.

It is proper for an administrative law judge to accord greater weight to a physician who "integrated all of the objective evidence" more than contrary physicians of record, particularly where he considered tests results showing diffusion impairment, reversibility studies, and blood gas readings. *Midland Coal Co. v. Director, OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004). Dr. Rosenberg certainly integrated all the objective evidence.

A general disability determination by a state or other agency, such as the 20% rating by the WVCWP Board here, is not binding on the Department of Labor with regard to a claim field under Part C, but the determination may be used as some evidence of disability or rejected as irrelevant at the discretion of the fact-finder.[41] *Schegan v. Waste Management & Processors, Inc.*, 18 B.L.R. 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 B.L.R. 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-1157 (1984) (opinion by the West Virginia Occupational Pneumoconiosis Board of a "15% pulmonary functional impairment" is relevant to disability but not binding). *McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988). Thus, I give the state determination some weight as to the existence of pneumoconiosis.

I find the claimants have met their burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) *aff'g sub. nom. Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

C. Cause of Pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a)(2001). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment.[42] 20 C.F.R §

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[40] "The Department did not reject *Stiltner* outright…" but, it is probable the opinion credited there "would be nearly impossible to credit today (2001 regulations)." Brian C. Murchison, Due Process, Black Lung, and the Shaping of Administrative Justice, 54 Admin. L. Rev. 1025, 1097 (2002)(DOL disagreed with Dr. Fino's opinion, in the rulemaking, acknowledging that dust-induced obstruction can occur but will cause no clinically significant deterioration in lung function unless it occurs in combination with a restrictive defect). *Id* at 1096.

[41] See § 718.206 "Effect of findings by persons or agencies." (65 Fed. Reg. 80050, Dec. 20, 2000) (Effective Jan. 19, 2001). If properly submitted, such evidence shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim.

[42] *Cranor v. Peabody coal Co.*, 21 B.L.R. 1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon.* 22 B.L.R. 1-1 (Oct. 29, 1999)(*En Banc*). Judge did not err considering a physician's X-ray interpretation "as positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) without considering the doctor's comment." The doctor reported

718.203(b)(2001).[43] Here, Dr. Repsher's comments suggesting the opacities he observed on X-ray might not have been CWP, but rather healed tuberculosis or granulomas, pales in comparison to the majority of solidly "positive" X-ray readings, particularly in the absence of established tuberculosis.

Since the miner had ten years or more of coal mine employment, he receives the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. Nor does the record contain contrary evidence that establishes the claimant's pneumoconiosis arose out of alternative causes.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b).[44] Section 718.204(b)(2)(i) through (b)(2)(iv) and (d) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment and gainful employment requiring comparable abilities and skills; and lay testimony.[45] Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

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the category I pneumoconiosis found on X-ray was not CWP. The Board finds this comment "merely addresses the source of the diagnosed pneumoconiosis" (and must be addressed under 20 C.F.R. § 718.203, "causation").

[43] Specifically, the burden of proof is met under § 718.203(c) when "competent evidence establish[es] that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment." *Shoup v. Director, OWCP,* 11 B.L.R. 1-110, 1-112 (1987). [The Sixth and Eleventh Circuits apply a more relaxed standard to state that the miner need only establish that his pneumoconiosis arose "in part" from his coal mine employment. *See Stomps v. Director, OWCP*, 816 F.2d 1533, 1- B.L.R. 2-107 (11th Cir. 1987); *Southard v. Director, OWCP,* 732 F.2d 66, 6 B.L.R. 2-26 (6th Cir. 1984).]

[44] The Board has held it is the claimant's burden to establish total disability due to CWP by a preponderance of the evidence. *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986)(en banc). 20 C.F.R. § 718.204 (Effective Jan. 19, 2001). Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis, states:

(a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease shall be considered in determining whether a miner is or was totally disabled due to pneumoconiosis.

[45] In a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish disability." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). See 20 C.F.R. § 718.204(d)(5)(living miner's statements or testimony insufficient alone to establish total disability). But, pre-death statements of a now deceased miner "shall be considered" in determining whether the miner was totally disabled at the time of death. 20 C.F.R. § 718.204(d)(4).

Section 718.204(b)(2)(iii) is not applicable because there is scant and unsupported evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure. Section 718.204(d) is not applicable because it only applies to a survivor's claim or deceased miners' claim in the absence of medical or other relevant evidence.

Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. More weight may be accorded to the results of a recent ventilatory study over those of an earlier study. *Coleman v. Ramey Coal Co.,* 18 B.L.R. 1-9 (1993). The three PFS, 1974, 1980, and 1981, in the miner's old claim were all non-qualifying. They are not considered in the survivor's claim. The two PFTs conducted in 2001 by Drs. Ranavaya and Crisalli both were non-qualifying pre-bronchodilator and qualifying post-bronchodilator. Dr. Ranavaya, who diagnosed PMF by X-ray, found the miner totally disabled by PMF, but failed to explain why. Dr. Crisalli interpreted his test as showing moderate air trapping and a mild air flow obstruction with no restrictive defect. Dr. Repsher interpreted all this to find the miner had a mild-to-moderate obstructive defect. Dr. Rosenberg interpreted Dr. Crisalli's post-bronchodilator test as showing improvement showing at worst a mild obstruction with a reversible component. Thus, I conclude that the PFS evidence, in and of itself, fails to establish a total respiratory disability given the mixed "qualifying" and "non-qualifying" pre and post-bronchodilator results.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b)(2)(ii). More weight may be accorded to the results of a recent blood gas study over one which was conducted earlier. *Schretroma v. Director, OWCP*, 18 B.L.R. 1-17 (1993). Only Dr. Ranavaya's 3/27/01 AGS is "qualifying". Dr. Rosenberg interpreted Dr. Crisalli's subsequent "nonqualifying"AGS as showing improvement from Dr. Ranavaya's test and "essentially normal" results for an 85-year old man. Given the fact the two most recent AGS have differing results and the most recent AGS shows improvement and essentially normal" results, the AGSs do not establish total disability in and of themselves.

Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition presents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b). Under this subsection, "…all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204.[46] The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP,* 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the

[46] Opinion that the miner should work in a dust-free environment does not constitute a total disability finding. *See White v. New White Coal Co*., 22 B.L.R. 1-___, BRB No. 03-0367 BLA (Jan. 22, 2004).

party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

I find that the miner's last coal mining positions required heavy manual labor. Because the miner's symptoms rendered him unable to perform the duties of a roof bolter, including lifting heavy materials, I find he was incapable of performing his prior coal mine employment.

The Fourth Circuit rule is that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." *Jewell Smokeless Coal Corp. v. Street,* 42 F.3d 241 (4th Cir. 1994). In *Milburn Colliery Co. v. Director, OWCP, [Hicks]*, 21 B.L.R. 2-323, 138 F.3d 524 (4th Cir. Mar. 6, 1998) *citing Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994), the Court had "rejected the argument that '[a] miner need only establish that he has a total disability, which may be due to pneumoconiosis in combination with nonrespiratory and nonpulmonary impairments." Even if it is determined that claimant suffers from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems." *Id.* at 534. See *Midland Coal Co. v. Director, OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004)(Upholding validity of 20 C.F.R. section 718.204(a)(2001)("any nonpulmonary or nonrespiratory condition or disease, which causes independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis."). However if, "a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether a miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. § 718.204(a). In this case, the claimant's failed to establish that the miner's CML caused a chronic respiratory or pulmonary impairment.

The Benefits Review Board had held that nonrespiratory and nonpulmonary impairments are irrelevant to establishing total disability, under 20 C.F.R. § 718.204. *Beatty v. Danri Corp.*, 16 B.L.R. 1-1 (1991).[47] *But see*, 20 C.F.R. § 718.204(a)(2001).

All the doctors, who commented on disability, found the miner was totally disabled. The issue of focus is what was the cause of the totally disability.

I find the miner has met his burden of proof in establishing the existence of total disability.[48] *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), *aff'g sub. Nom. Greenwich Colleries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

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[47] The Board has held that its earlier statement, in *Carson*, that "The disabling loss of lung function due to extrinsic factors, e.g., loss of muscle function due to stroke, does not constitute respiratory or pulmonary disability pursuant to 20 C.F.R. § 718.204(c)," was incorrect and struck the language from its opinion. *Carson v. Westmoreland Coal Co.*, 20 B.L.R. 1-64 (1996), *mod'g on recon.*, 19 B.L.R. 1-16 (1994).

[48] *White v. New White Coal Co*., 23 B.L.R. 1-1, BRB No. 03-0367 BLA (Jan. 22, 2004) at 1-6. Judge is not required to consider claimant's age, education and work experience in determining whether the claimant suffers from a total respiratory disability. These issues are not relevant to it, pursuant to 20 C.F.R. section 718.204(b)(2)(iv).

E. Cause of total disability[49]

The revised regulations, 20 C.F.R. § 718.204(c)(1)[50], require a claimant establish his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary disability.[51] The January 19, 2001 changes to 20 C.F.R. § 718.204(c)(1)(i) and (ii), adding the words "material" and "materially", results in "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. No. 245, 799946 (Dec. 20, 2000).[52] If the pneumoconiosis "materially worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment, it is considered a "substantially contributing cause" of the disability. 20 C.F.R. § 718.204(c)(1)(ii)(2001).

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[49] *Billings v. Harlan #4 Coal Co.*, ___ B.L.R. __, BRB No. 94-3721 (June 19, 1997). The Board has held that the issues of total disability and causation are independent; therefore, administrative law judges need not reject a Doctor's opinion on causation simply because the doctor did not consider the claimant's respiratory impairment to be totally disabling.

[50] *Gross v. Dominion Coal Corp.,* 23 B.L.R. 1-8, BRB No. 03-0118 (2003). "'The substantially contributing cause' standard of revised Section 718.204(c) was not intended to alter the meaning of 'total disability due to pneumoconiosis' as previously determined in decisions by the various United States Courts of Appeal under Part 718, but rather was intended to codify the courts' decisions. 65 Fed. Reg. at 79946-47. Under the existing law of the Fourth Circuit, claimant is not required to establish relative degrees of causal contribution by pneumoconiosis and smoking to demonstrate that his total disability is due to pneumoconiosis. See *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35 (CA4 1990)(holding that a claimant must prove that pneumoconiosis is at least a contributing cause of total disability). Pneumoconiosis must be a necessary condition of the claimant's disability in that it cannot play a merely de minimis role. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 B.L.R. 2-304, 2-320 n.8 (4th Cir. 1995)." (Fn 10, at 1-18) "Consequently, the revised regulation requires that the adverse effect of pneumoconiosis be 'material.'"

[51] This standard is more consistent with the Third Circuit's pre-amendment "substantial contributor" standard set forth in *Bonessa v. U.S. Steel Corp*., 884 F.2d 726, 13 B.L.R. 2-23 (3d Cir. 1989) than the Fourth Circuit's "contributing cause" standard set forth in *Robinson v. Picklands Mather & Co./ Leslie Coal Co. v. Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35, 38 (4th Cir. 1990). In *Gross v. Dominion Coal Corp.,* 23 B.L.R. 1-8, BRB No. 03-0118 (2003), the Board observed that "[U]nder the existing law of the Fourth Circuit, claimant is not required to establish relative degrees of causal contribution by pneumoconiosis and smoking to demonstrate that his total disability is due to pneumoconiosis. See *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35 (CA4 1990)(holding that a claimant must prove that pneumoconiosis is at least a contributing cause of total disability). Pneumoconiosis must be a necessary condition of the claimant's disability in that it cannot play a merely *de minimis* role. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 B.L.R. 2-304, 2-320 n.8 (4th Cir. 1995)."

[52] Effective January 19, 2001, § 718.204(a) states, in pertinent part:

> For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

The Board had previously required that pneumoconiosis be a "contributing cause" of the miner's disability. *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(*en banc)*, *overruling Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988). *But see*, 20 C.F.R. § 718.204(c)(1)(2001).

The Fourth Circuit Court of Appeals had required that pneumoconiosis be a "contributing cause" of the claimant's total disability.[53] *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). *But see*, 20 C.F.R. § 718.204(c)(1)(2001).

In *Street*, the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respiratory or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to this disability." *Street*, 42 F.3d 241 at 245.

"A claimant must be totally disabled due to pneumoconiosis and any other respiratory or pulmonary disease, not due to other non-respiratory or non-pulmonary ailments, in order to qualify for benefits." *Beatty v. Danri Corp. & Triangle Enterprises*, 16 B.L.R. 1-11 (1991) *aff'd* 49 F.3d 993 (3d Cir. 1995) *accord Jewell Smokeless Coal Corp.* (So, under *Beatty*, one whose disability is only 10% attributable to pneumoconiosis would be unable to recover benefits if his completely unrelated physical problems (i.e., stroke) created 90% of his total disability). *But see*, 20 C.F.R. § 718.204(c)(1)(2001).

There is evidence of record that claimant's respiratory disability may be due, in part, to his undisputed history of cigarette smoking.[54] However, to qualify for Black Lung benefits, the claimant need not prove that pneumoconiosis is the "sole" or "direct" cause of his respiratory disability, but rather that it has contributed to his disability. *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 914 F.2d 35, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-76. *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*). There is no requirement that doctors "specifically apportion the effects of the miner's smoking and his dust exposure in coal mine employment upon the miner's condition." *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*) *citing generally, Gorzalka v. Big Horn Coal Co.*, 16 B.L.R. 1-48 (1990). *See Consolidation Coal Co. v. Swiger*,

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[53] *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). Under *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L..R 2-68 at 2-76, 914 F.2d 35 (4th Cir. 1990), the terms "due to," in the statute and regulations, means a "contributing cause," not "exclusively due to." In *Roberts v. West Virginia C.W.P. Fund & Director, OWCP*, 74 F.3d 1233 (1996 WL 13850)(4th Cir. 1996) (Unpublished), the Court stated, "So long as pneumoconiosis is a 'contributing' cause, it need not be a 'significant' or 'substantial' cause." *Id.* But see *Gross v. Dominion Coal Corp.,* 23 B.L.R. 1-8, BRB No. 03-0118 (2003), where the Board observed that "[U]nder the existing law of the Fourth Circuit, claimant is not required to establish relative degrees of causal contribution by pneumoconiosis and smoking to demonstrate that his total disability is due to pneumoconiosis. See *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35 (CA4 1990)(holding that a claimant must prove that pneumoconiosis is at least a contributing cause of total disability). Pneumoconiosis must be a necessary condition of the claimant's disability in that it cannot play a merely *de minimis* role. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 B.L.R. 2-304, 2-320 n.8 (4th Cir. 1995)."

[54] *Sewell Coal Co. v. Director, OWCP [O'Dell]* (Unpublished), 22 B.L.R. 2-213, No. 00-2253 (4th Cir. July 26, 2001)(Unpublished). "…the mere documentation of a smoking history on the official OWCP form or elsewhere, without more, cannot reasonably imply that an examining physician has 'addressed the possibility that cigarette smoking caused the claimant's disability." *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 at 371 (4th Cir. 1994).

Case No. 03-1971 (4th Cir. May 11, 2004)(Unpub.) citing with approval *Cornett v. Benham Coal, Inc*., 227 F.3d 569, Case No. 99-3469, 22 B.L.R. 2-107 (6th Cir. Sept. 7, 2000). *Consolidation Coal Co. v. Director, OWCP [Williams],* ___ F.3d ___, Case No. 05-2108 (4th Cir. July 13, 2006)(Physicians need not make "such particularized findings."(Apportioning lung impairment between smoking and coal mine dust exposure)).

If the claimant would have been disabled to the same degree and by the same time in his life had he never been a miner, then benefits cannot be awarded. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Picklands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990).[55]

Drs. Gaziano and Chillag, found the miner disabled due to his age, at the time of their examinations, in 1975 and 1980, respectively. Dr. Rosenberg found him totally disabled by his CML. Dr. Repsher found that the miner probably would be limited in performing coal mine work, but did not specify exactly the etiology of the disability. Dr. Ranavaya found the miner disabled by PMF, but provided no reasoning and I have not found PMF established. Nor has any physician linked the miner's CML to the total respiratory disability. Thus, I find the evidence does not establish that either clinical or legal pneumoconiosis were the cause of the miner's total disability.

F. Survivor's Claim

Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that death will be due to pneumoconiosis if any of the following criteria are met:

> (1) competent medical evidence established that the miner's death was caused by pneumoconiosis; or
>
> (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or
>
> (3) the presumption of § 718.304 [complicated pneumoconiosis] is applicable.

20 C.F.R. § 718.205(c). Criteria (1) and (3) are not established in this case; criterion (2) is the focus.

The Board concludes that death must be "significantly" related to or aggravated by pneumoconiosis, while the circuit courts have developed the "hastening death" standard which requires establishment of a lesser causal nexus between pneumoconiosis and the miner's death. *Foreman v. Peabody Coal Co.*, 8 B.L.R. 1-371, 1-374 (1985). The regulation now provides that

[55] "By adopting the 'necessary condition' analysis of the Seventh Circuit in *Robinson*, we addressed those claim…in which pneumoconiosis has played only a *de minimis* part. *Robinson*, 914 F.2d at 38, n. 5." *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195 n. 8 (4th Cir. 1995).

"[P]neumoconiosis is a 'substantially contributing' cause of death if it hastens the miner's death." 20 C.F.R. § 718.205(c)(5). The United States Court of Appeals for the Third Circuit has also held that any condition that *hastens* the miner's death is a substantially contributing cause of death for purposes of § 718.205. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989). [56]

The Fourth Circuit Court of Appeals, in *Hill v. Peabody Coal Co.*, Case No. 03-3321 (6th Cir. April 7, 2004)(Unpublished), reiterated its holding in *Eastover Mining Co. v. Director, OWCP [Williams]*, 338 F.3d 501, No. 01-4064 (6th Cir. July 31, 2003), that treating physicians' opinions "get the deference they deserve based on their general power to persuade." Citing *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000), the Sixth Circuit Court held a doctor's conclusory statement on a death certificate, without further elaboration, is insufficient to meet claimant's burden as to the cause of death.[57]

Only Drs. Atkins, Repsher, and Rosenberg commented on the cause of death. Dr. Atkins' related on the Death Certificate, that CML was the cause of death, listing "chronic lung disease" as an "other" significant condition contributing to death. No autopsy was performed and Dr. Atkins provided no reasoning. Under *Sparks, supra,* without more, I cannot find this sufficient to establish contribution. Drs. Repsher, and Rosenberg listed CML as the cause of death and both concluded that the miner had no occupational lung disease and that occupational lung disease played no role in the miner's death. Dr. Rosenberg's opinion is the most thorough in the entire record. Thus, given the above, and absent an autopsy and any reasoned report of the treating physician, I do not find the evidence presented establishes CWP played any role in the miner's death.

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[56] The Fourth, Sixth, Seventh, Tenth and Eleventh Circuits have adopted this position in *Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4th Cir. 1992), *cert. den.,* 506 U.S. 1050, 113 S.Ct. 969 (1993); *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812 (6th Cir. 1993)(J. Batchelder dissenting*);* and *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178 (7th Cir. 1992); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 (10th Cir. 1996); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 B.L.R. 2-166 (11th Cir. 1997).

[57] *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 B.L.R. 2-251, 2000 WL 665639 (4th Cir. May 22, 2000). Prosector's mere conclusion on death certificate that CWP contributed to miner's death was insufficient without further explanation to support such a finding under Act.

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimants for the representation services rendered to them in pursuit of the claim.

CONCLUSIONS

In conclusion, it is established that a material change in condition has taken place since the previous denial, because the miner was totally disabled prior to his death. The miner had pneumoconiosis, as defined by the Act and Regulations. It was proven that the pneumoconiosis arose out of the miner's coal mine employment. The miner was totally disabled. However, it was not proven that his total disability was due to pneumoconiosis. Nor was it proven that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. The now deceased miner and now deceased surviving spouse were therefore not entitled to benefits.

ORDER[58]

It is ordered that the claims of R.S., Substitute Party for the Claimants, for benefits under the Black Lung Benefits Act are hereby DENIED.

A

RICHARD A. MORGAN

Administrative Law Judge

PAYMENT IN ADDITION TO COMPENSATION: 20 C.F.R. § 725.530(a)(Applicable to claims adjudicated on or after Jan. 20, 2001) provides that "An operator that fails to pay any benefits that are due, with interest, shall be considered in default with respect to those benefits, and the provisions of § 725.605 of this part shall be applicable. In addition, a claimant who does not receive any benefits within **10 days** of the date they become due is entitled to additional compensation equal to **twenty percent** of those benefits (see § 725.607)."

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA,

[58] § 725.478 Filing and service of decision and order (Change effective Jan. 19, 2001). Upon receipt of a decision and order by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.

("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.**[59]
At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter **to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210**. *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

Notice of public hearing: By statute and regulation, black lung hearings are open to the public. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 923(b)); 20 C.F.R. § 725.464. Under e-FOIA, final agency decisions are required to be made available via telecommunications, which under current technology is accomplished by posting on an agency web site. *See* 5 U.S.C. § 552(a)(2)(E). *See also* Privacy Act of 1974; Publication of Routine Uses, 67 Fed. Reg. 16815 (2002) (DOL/OALJ-2). Although 20 C.F.R. § 725.477(b) requires decisions to contain the names of the parties, it is the policy of the Department of Labor to avoid use of the Claimant's name in case-related documents that are posted to a Department of Labor web site. Thus, the final ALJ decision will be referenced by the Claimant's initials in the caption and only refer to the Claimant by the term "Claimant" in the body of the decision. If an appeal is taken to the Benefits Review Board, it will follow the same policy. This policy does not mean that the Claimant's name or the fact that the Claimant has a case pending before an ALJ is a secret.

[59] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.